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***Attorneys for Defendants***

FIZZEE'S, LLC erroneously sued herein as FIZZEE'S BAR, 3954 GEARY BLVD, SAN FRANCISCO, CA and ALBERTS 1987 TRUST erroneously sued herein as ALBERTS 1987 TRUST AGREEMENT, 900 SANTIAGO STREET, SAN FRANCISCO, CA

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

AMERICANS WITH DISABILITIES  
 ADVOCATES, a Nevada Nonprofit  
 Corporation, RICHARD WHITEHURST  
 and GEORGE S. LOUIE

Plaintiffs,

v.

FIZZEE'S BAR, 3954 GEARY BLVD,  
 SAN FRANCISCO, CA and ALBERTS  
 1987 TRUST AGREEMENT, 900  
 SANTIAGO STREET, SAN  
 FRANCISCO, CA

Defendants.

Case No. C 03 2942 SI

***DEFENDANTS FIZZEE'S, LLC AND  
 ALBERTS 1987 TRUST'S ANSWER TO  
 COMPLAINT***

***DEMAND FOR TRIAL BY JURY***

COME NOW defendant, FIZZEE'S, LLC, erroneously sued herein as FIZZEE'S BAR, 3954 GEARY BLVD, SAN FRANCISCO, CA and ALBERTS 1987 TRUST erroneously sued herein as ALBERTS 1987 TRUST AGREEMENT, 900 SANTIAGO STREET, SAN FRANCISCO, CA ("defendants" or "these answering defendants"), and respond to the Complaint for Violation of Civil Rights and Discrimination Against Persons With Disabilities; Americans With Disabilities Act of 1990; Cal. Civil Code §§54, *et seq.*; Cal Civil Code §3345; Cal. Health & Safety Code §§19955, *et seq.*, Negligence; Declaratory Relief; Damages for Personal Injury ("the Complaint"), as follows:

///

**INTRODUCTION**

1  
2 1. In response to the allegations contained in paragraph 1 of the Complaint, set  
3 forth between page 1, line 25 and page 3, line 13, these answering defendants: 1) admit  
4 that plaintiff AMERICANS WITH DISABILITIES ADVOCATES (“AWDA”) is a legal entity  
5 incorporated in the States of Nevada and California that claims an exemption from  
6 paying corporate income tax pursuant to section 501(c) of the Internal Revenue Code;  
7 2) admit that there is a height differential on Geary Boulevard between the subject  
8 property and the sidewalk immediately adjacent thereto; 3) deny that it is impossible for  
9 individuals with disabilities affecting mobility to gain access to FIZZEE’S SPORTS BAR;  
10 and 4) deny the remaining allegations contained therein based upon the absence of  
11 knowledge and information sufficient to form a belief as to the truth of the allegations.

**JURISDICTION**

12  
13 2. In response to the allegations contained in the two unnumbered paragraphs  
14 set forth between lines 15 and 21 on page 3, these answering defendants: 1) admit that  
15 the court has subject matter jurisdiction over the claims giving rise to a federal question  
16 and personal jurisdiction over these answering defendants; and 2) deny the remaining  
17 allegations contained therein based upon the absence of knowledge and information  
18 sufficient to form a belief as to the truth of the allegations.

**VENUE**

19  
20 3. In response to the allegations contained in paragraph 3 of the Complaint,  
21 these answering defendants: 1) admit that venue is proper with respect to those claims  
22 over which this court has subject matter jurisdiction; 2) deny that FIZZEE’S BAR is a  
23 California corporation and/or a legal entity of any type; 3) deny that ALBERTS 1987  
24 TRUST AGREEMENT is a California corporation and/or business; and 4) deny the  
25 remaining allegations contained therein based upon the absence of knowledge and  
26 information sufficient to form a belief as to the truth of the allegations.

27 ///

**PARTIES**



1 City and County of San Francisco, State of California; 2) deny that ALBERTS 1987 TRUST  
2 AGREEMENT owns, operates and maintains a public accommodation as FIZZEE'S BAR;  
3 3) deny that either or both defendants failed to provide the minimum legally required  
4 access to FIZZEE'S SPORTS BAR for persons with disabilities; and 4) deny the  
5 remaining allegations contained therein based upon the absence of knowledge and  
6 information sufficient to form a belief as to the truth of the allegations.

7 12. In response to the allegations contained in paragraph 12 of the Complaint,  
8 these answering defendants deny the allegations.

9 13. In response to the allegations contained in paragraph 13 of the Complaint,  
10 these answering defendants deny the allegations.

11 14. In response to the allegations contained in paragraph 14 of the Complaint,  
12 these answering defendants deny the allegations.

13 15. In response to the allegations contained in paragraph 15 of the Complaint,  
14 these answering defendants deny the allegations.

15 16. In response to the allegations contained in paragraph 16 of the Complaint,  
16 these answering defendants: 1) admit that California Civil Code §52(a) provides:  
17 "Whoever denies, aids or incites a denial, or makes any discrimination or distinction  
18 contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual  
19 damages, and any amount that may be determined by a jury, or a court sitting without a  
20 jury, up to a maximum of three times the amount of actual damage but in no case less  
21 than four thousand dollars (\$4,000), and any attorney's fees that may be determined by  
22 the court in addition thereto, suffered by any person denied the rights provided in  
23 Section 51, 51.5, or 51.6;" 2) admit that this code section has been amended numerous  
24 times including 2001; and 3) deny the remaining allegations contained therein based  
25 upon the absence of knowledge and information sufficient to form a belief as to the truth  
26 of the allegations.

27 17. In response to the allegations contained in paragraph 17 of the Complaint,  
28 these answering defendants: 1) admit that California Civil Code §51(a) was amended in

2001 to increase the minimum penalty amount from \$1,000 to \$4,000; and 2) deny the remaining allegations contained therein based upon the absence of knowledge and information sufficient to form a belief as to the truth of the allegations.

18. In response to the allegations contained in paragraph 18 of the Complaint, these answering defendants deny the allegations contained therein based upon the absence of knowledge and information sufficient to form a belief as to the truth of the allegations.

### **FIRST CLAIM**

19. In response to the allegations contained in paragraph 19 of the Complaint, these answering defendants admit the specified allegations are to be incorporated by reference and hereby incorporate herein by reference the responses to these allegations as set forth above.

20. In response to the allegations contained in paragraph 20 of the Complaint, these answering defendants deny the allegations.

21. In response to the allegations contained in paragraph 21 of the Complaint, these answering defendants: 1) admit that FIZZEE'S, LLC owns, operates and maintains a business in the nature of a bar and tavern called "FIZZEE'S SPORTS BAR" within the City and County of San Francisco, State of California that is open to the general public; 2) deny that ALBERTS 1987 TRUST AGREEMENT is a public accommodation; and 3) deny the remaining allegations contained therein based upon the absence of knowledge and information sufficient to form a belief as to the truth of the allegations.

22. In response to the allegations contained in paragraph 22 of the Complaint, these answering defendants deny the allegations.

23. In response to the allegations contained in paragraph 23 of the Complaint, these answering defendants deny the allegations.

24. In response to the allegations contained in paragraph 24 of the Complaint, these answering defendants deny the allegations.

25. In response to the allegations contained in paragraph 25 of the Complaint,

these answering defendants deny the allegations.

## **SECOND CLAIM**

26. In response to the allegations contained in paragraph 26 of the Complaint, these answering defendants admit the specified allegations are to be incorporated by reference and hereby incorporate herein by reference the responses to these allegations as set forth above.

27. In response to the allegations contained in paragraph 27 of the Complaint, these answering defendants: 1) admit that FIZZEE'S, LLC owns, operates and maintains a business in the nature of a bar and tavern called "FIZZEE'S SPORTS BAR" within the City and County of San Francisco, State of California that is open to the general public; 2) deny that ALBERTS 1987 TRUST AGREEMENT is a public accommodation; and 3) deny the remaining allegations contained therein based upon the absence of knowledge and information sufficient to form a belief as to the truth of the allegations.

28. In response to the allegations contained in paragraph 28 of the Complaint, these answering defendants deny the allegations.

29. In response to the allegations contained in paragraph 29 of the Complaint, these answering defendants deny the allegations.

30. In response to the allegations contained in paragraph 30 of the Complaint, these answering defendants deny the allegations.

## **THIRD CLAIM**

31. In response to the allegations contained in paragraph 31 of the Complaint, these answering defendants admit the specified allegations are to be incorporated by reference and hereby incorporate herein by reference the responses to these allegations as set forth above.

32. In response to the allegations contained in paragraph 32 of the Complaint, these answering defendants deny the allegations.

33. In response to the allegations contained in paragraph 33 of the Complaint, these answering defendants deny the allegations.



1 these answering defendants admit the allegations.

2 42. In response to the allegations contained in paragraph 42 of the Complaint,  
3 these answering defendants deny the allegations.

4 43. In response to the allegations contained in paragraph 43 of the Complaint,  
5 these answering defendants deny the allegations.

6 44. In response to the allegations contained in paragraph 44 of the Complaint,  
7 these answering defendants: 1) admit that the various statutory references contained  
8 therein were in effect in their various iterations on the dates stated within the statutes  
9 themselves; 2) require compliance with the mandates contained therein in accordance with  
10 language of the statutes themselves, as well as the case law interpreting them; and 3)  
11 deny the remaining allegations contained therein based upon the absence of knowledge  
12 and information sufficient to form a belief as to the truth of the allegations.

13 45. In response to the allegations contained in paragraph 45 of the Complaint,  
14 these answering defendants deny the allegations.

15 46. In response to the allegations contained in paragraph 46 of the Complaint,  
16 these answering defendants deny the allegations.

17 **SIXTH CLAIM**

18 47. In response to the allegations contained in paragraph 47 of the Complaint,  
19 these answering defendants admit the specified allegations are to be incorporated by  
20 reference and hereby incorporate herein by reference the responses to these allegations  
21 as set forth above.

22 48. In response to the allegations contained in paragraph 48 of the Complaint,  
23 these answering defendants admit the allegations.

24 49. In response to the allegations contained in paragraph 49 of the Complaint,  
25 these answering defendants deny the allegations.

26 **SEVENTH CLAIM**

27 50. In response to the allegations contained in paragraph 50 of the Complaint,  
28 these answering defendants admit the specified allegations are to be incorporated by



reference and hereby incorporate herein by reference the responses to these allegations as set forth above.

51. In response to the allegations contained in paragraph 51 of the Complaint, these answering defendants deny the allegations contained therein based upon the absence of knowledge and information sufficient to form a belief as to the truth of the allegations.

52. In response to the allegations contained in paragraph 52 of the Complaint, these answering defendants deny the allegations contained therein based upon the absence of knowledge and information sufficient to form a belief as to the truth of the allegations.

53. In response to the allegations contained in paragraph 53 of the Complaint, these answering defendants deny the allegations.

As and for separate and distinct affirmative defenses to plaintiffs' complaint on file herein, defendants allege as follows:

**FIRST AFFIRMATIVE DEFENSE**

1. Plaintiffs fail to state facts sufficient to state a claim upon which relief may be granted against these answering defendants.

**SECOND AFFIRMATIVE DEFENSE**

2. Plaintiffs failed, and continue to fail, to take reasonable steps to mitigate their damages.

**THIRD AFFIRMATIVE DEFENSE**

3. Plaintiffs lack standing.

**FOURTH AFFIRMATIVE DEFENSE**

4. Plaintiffs' claims for damages are due, if at all, to the wrongful conduct of others.

**FIFTH AFFIRMATIVE DEFENSE**

5. The accommodations requested by plaintiffs are not readily achievable.

**SIXTH AFFIRMATIVE DEFENSE**

1           6.     The accommodations requested by plaintiffs are not feasible.

2                           **SEVENTH AFFIRMATIVE DEFENSE**

3           7.     The accommodations requested by plaintiffs would result in undue  
4 burden.

5                           **EIGHTH AFFIRMATIVE DEFENSE**

6           8.     Plaintiffs' claims are barred by the doctrine of laches.

7                           **NINTH AFFIRMATIVE DEFENSE**

8           9.     Plaintiffs' claims are barred by the doctrine of estoppel.

9                           **TENTH AFFIRMATIVE DEFENSE**

10          10.    Plaintiffs' claims are barred by the doctrine of waiver.

11                          **ELEVENTH AFFIRMATIVE DEFENSE**

12          11. Plaintiffs were partially, if not wholly, negligent or otherwise at fault and  
13 should be barred from recovery of that portion of the damages directly attributable to  
14 their proportionate share of the negligence or fault, pursuant to the doctrine of  
15 comparative negligence.

16                          **TWELFTH AFFIRMATIVE DEFENSE**

17          12.    The damages sustained by plaintiffs, if any, were caused, in whole or in  
18 part, by the negligence or fault of others for which defendants are not liable or  
19 responsible.

20                          **THIRTEENTH AFFIRMATIVE DEFENSE**

21          13.    If defendants are responsible in any respect for any injuries or damages  
22 suffered by plaintiffs, which defendants expressly deny, such injuries or damages have  
23 been caused by or contributed to by others, and defendants' proportional liability, if any,  
24 should be reduced to the extent thereof.

25                          **FOURTEENTH AFFIRMATIVE DEFENSE**

26          14.    Defendants did not intentionally, or otherwise, impede or impair access to  
27 plaintiffs.

28                          **FIFTEENTH AFFIRMATIVE DEFENSE**

1           15.    Plaintiffs' claims, if any, are barred by their failure to exhaust  
2 administrative remedies.

3                                   **SIXTEENTH AFFIRMATIVE DEFENSE**

4           16.    Any award of punitive damages in this action would violate defendants'  
5 constitutional rights, including the right to due process.

6                                   **REQUEST FOR TRIAL BY JURY**

7           Defendants hereby request trial by jury on all issues triable by jury.

8                                   **PRAYER FOR RELIEF**

9           WHEREFORE, defendants respectfully request:

- 10           1.     That plaintiffs take nothing by way of their complaint;  
11           2.     That plaintiffs' complaint be dismissed in its entirety with prejudice;  
12           3.     That defendants be granted their reasonable attorneys' fees, costs and  
13 expenses; and  
14           4.     That the court award such other and further relief as it deems just and  
15 proper.

16   Dated: August 18, 2003

Respectfully submitted,

17                                   **AARON & WILSON, LLP**

18  
19                                   By \_\_\_\_\_  
20                                   ROBERT S. AARON  
21                                   **Attorneys for Defendants**  
22                                   FIZZEE'S, LLC erroneously sued herein  
23                                   as FIZZEE'S BAR, 3954 GEARY BLVD,  
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